SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1059

HAMILTON MANUFACTURING COMPANY,
Petitioner,
v.
METAL BUILDINGS INSULATION, INC.
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Nature of the Case

This is an indemnity action arising out of a tort case whereby Respondent, Metal Buildings Insulation, Inc., (hereinafter referred to as MBI), seeks to recover indemnity from Petitioner, Hamilton Manufacturing Company, (hereinafter referred to as Hamilton).

Resume of Pleadings and Proceedings

Respondent MBI was one of three defendants in a suit filed in Pierce County, Washington by Puget Sound Bulb Exchange. Therein recovery was sought for damages allegedly incurred relative to a building constructed for the plaintiff in which MBI insulation was used.

MBI in turn filed a third party complaint against its supplier, Petitioner-Hamilton. In the complaint MBI alleged it was being sued because of damage which was caused by the water retention qualities of certain chemicals present in the Kraft paper which Hamilton had sold it, and that the permeability qualities of the Kraft paper were deficient.

Hamilton appeared and filed an answer. It also moved for a dismissal for lack of jurisdiction. The motion was heard on the basis of four affidavits and one deposition. The Superior Court dismissed Hamilton as a third party defendant.

The trial proceeded and ultimately MBI was held liable to plaintiff for $96,062.30 and to the co-defendants for the co-defendants' attorneys' fees.

MBI then took an appeal to the Court of Appeals of the State of Washington seeking to have the question of jurisdiction reviewed. The Court of Appeals heard the matter and reversed the dismissal stating:

> The order of dismissal is reversed and the cause remanded for further proceedings consistent with this opinion.

Subsequently, Hamilton sought a rehearing which was denied. Hamilton also sought review by the Washington Supreme Court and this was likewise denied.

ARGUMENT OF COUNSEL

I. Since No "Final Judgment" Has Been Rendered Herein This Court Does Not Have Jurisdiction to Hear This Matter

Hamilton premises alleged jurisdiction on 28 U.S.C. §1257(3). In pertinent part it provides:

> Final judgment or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . .
>
> (3) By writ of certiorari, . . . where the validity of a state's statute is drawn in question on the ground of it being repugnant to the Constitution . . . of the United States. . . .

We find a discussion of the statute in *Pope v. Atlantic Coastlines R.R.*, 345 U.S. 379, 381 (1952):

> The statute which vests us with jurisdiction to review the decisions of state courts provides that the judgment must come from the 'highest court of a state in which a decision could be had,' and must be 'final.' 28 U.S.C. §1257. The case at bar clearly met the first requirement, but we were in doubt as to whether it satisfied the second.
>
> Congress has limited our power to review judgments from state courts lest the court's jurisdiction be exercised in piecemeal proceedings to render advisory opinions. Were our reviewing power not limited to 'final' judgments, litigants would be free to come here and seek a decision on federal questions which, after later proceedings, might subsequently prove to be unnecessary and irrelevant to a complete disposition of the litigation. Ordinarily, then, the overruling of a demurrer, like the issuance of a temporary injunction, is not a 'final' judgment.

We may also note *Arnold v. United States of America, for the use of W. B. Guimarin & Co.*, 263 U.S. 427, 434 (1923):

> It is well settled that a case may not be brought here by writ of error or appeal in fragments; that to be reviewable a judgment or decree must be not only final, but complete; that is, final not only as to all the parties, but as to the whole subject matter and as to all the causes of action involved; and that if the judgment or decree be not thus final and complete, the writ of error or appeal must be dismissed for want of jurisdiction.

Georgia Railway & Power Co. v. Town of Decatur, 262 U.S. 432, 437 (1922):

> . . . The rule is established that, in order to give this court appellate jurisdiction, the judgment or decree 'must terminate the litigation between the parties on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered.'

County of St. Clair v. Lovingston, 85 U.S. 628 (1873) following *Moore v. Robbins*, 85 U.S. 580 (1873) stated:

> No judgment is final which does not terminate the litigation between the parties to the suit. From the record brought up to us it appears that the Supreme Court reversed the judgment which had been obtained in the Circuit Court and remanded the cause for such other and further proceedings as to law and justice shall appertain. The issue between the parties may be again tried in the Circuit Court, and another judgment may be recovered which may be removed to the Supreme Court for revision. Consequently, then, there has been no final determination of the case.

The decision which Hamilton wishes to have this court review is not a final decision. It is a decision of the Washington Court of Appeals in which that court ordered *"the cause remanded for further proceedings consistent with this opinion."* What further proceedings? In order to ascertain that we must review what proceedings had occurred previously. Actually very little had occurred previously. Hamilton filed an answer to MBI's third party complaint. In that answer, which denied most of MBI's material allegations, Hamilton set out four affirmative defenses:

(1) MBI has no right of indemnity from Hamilton;

(2) MBI failed to state a claim upon which relief could be granted;

(3) Statute of limitations;

(4) Lack of jurisdiction.

As is obvious, there is nothing in any way approaching finality in this case. There has been absolutely no determination on MBI's major claim to say nothing of three of Hamilton's four affirmative defenses. Moreover, even as to Hamilton's fourth affirmative defense, jurisdiction, this was only reviewed as a summary judgment.

As is clearly evident by this point, this case is not ripe for review by this court.

II. The Decision in Question Herein Conforms to a Multitude of State and Federal Court Decisions and Is in Accord With the Decisions of This Court

Hamilton's muted outrage at having been brought to the bar of justice to answer for its tort would be more credible if the year were 1874, not 1974. Essentially, Hamilton's position is that while it ships its products into 15 different states, and while it knows that its products are reshipped by its customers into all states, it is immune to suit for the harm its products cause save in those 15 states. We have been unable to locate any authority to support such a position.

Now, this court has expressly indicated that a review on writ of certiorari is a matter of sound judicial discretion which will be exercised only when there are special and important reasons therefor. Specifically, the court has indicated that it would look with interest where a state court has decided a federal question of substance not heretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this

court. Hamilton's argument fails utterly to demonstrate any such situation herein.

Basically, the factual situation is this. Hamilton sold its Kraft paper to many customers including MBI. Hamilton knew that many of its customers, including MBI, used the product or sold it to their own customers. Specifically, as to MBI, Hamilton was aware that MBI resold its products using Hamilton's products in all of the states of the Union. Specifically, Kraft paper sold to MBI in 1966 was used in Pierce County, Washington where it caused substantial damage.

What Hamilton did herein was to knowingly put its product into the stream of interstate commerce. It took advantage of this vast market to increase its sales. It was not selling to the guy down the street or around the corner. It was selling to customers which it knew sold in all states.

What occurred herein was not particularly novel or innovative. The result was in accordance with a line of Washington cases, *Deutsch v. West Coast Manufacturing Co.*, 80 Wn.2d 707, 497 P.2d 1311 (1972), *cert. den'd*, 409 U.S. 1009; *Omstead v. Braden Heaters, Inc.*, 80 Wn.2d 720, 497 P.2d 1310 (1972); *Golden Gate Hop Ranch, Inc. v. Velsico Chemical Co.*, 66 Wn.2d 469, 403 P.2d 351 (1965); as well as numerous federal decisions: *Benn v. Linden Crane Co.*, 326 Fed. Supp. 995 (E. D. Pa. 1971); *Gorso v. Bell Equipment Corp.*, 330 Fed. Supp. 934 (W. D. Pa. 1971); *Scafati v. Bayerische Motoren Werke A. G.*, 53 F.R.D. 256 (W. D. Pa. 1971); *Blum v. Kawaguchi Ltd.*, 331 Fed. Supp. 216 (D. Neb. 1971); *Liberty Mutual Ins. Co. v. American Pecco Corp.*, 334 Fed. Supp. 522 (D. D.C. 1971).

The rationale for holding a manufacturer, who uses interstate commerce, amenable to suit in the jurisdiction where he causes harm has been noted by several courts.

> A shipment of goods indicates a conscious placement of those goods into the stream of commerce. Obviously, if a manufacturer sells its products directly to the ultimate consumer, the movement of those goods pursuant to the sale would be a direct shipment. However, economic and business reasons dictate that goods will pass through any number of people in a distributive chain before they reach the ultimate consumer. It is the movement of goods through this distributive chain that in this case constitutes an 'indirect shipment'.
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> *Benn v. Linden Crane*, 326 Fed. Supp. 995, 997 (E.D. Pa. 1971).
>
> When a manufacturer voluntarily chooses to sell his product in a way in which it will be resold from dealer to dealer, transferred from hand to hand and transported from state to state, he cannot reasonably claim that he is suprised at being held to answer in any state for the damage that the product causes.
>
> • • •
>
> Where a defendant does business of such volume or with such a pattern of product distribution, that he should reasonably anticipate that his product may be ultimately used in any state, he has done the act required for the exercise of jurisdiction by the state where the injured user resides.
>
> *Keckler v. Brookwood Country Club*, 248 Fed. Supp. 645 (N. D. Ill. 1965).
>
> The connecting link may consist of . . . the start of a commercial process outside the forum state on the assumption that the article will be sold, used or acted upon or within many other states but with no particular jurisdiction in actual contemplation. . . . The existence of [this] phenomena of modern economy [is] ordinarily enough to bring the parties within the long

> arm statute without engendering an unjust or oppressive extension of jurisdiction.
>
> *Griffiths & Sprague Stevedoring Co. v. Bailey, Martin & Fay, Inc.*, 71 Wn.2d 679, 430 P.2d 600 (1967).

The foregoing cases, which represent only a small number of the many, did not evolve on their own. Instead, they represent a studied effort by the courts to avoid imposing frozen ideas of due process while all of society, including manufacturing, marketing and distribution, undergo a technological revolution. The guidance for their efforts has come from this court. We find in *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945):

> But now that the capias ad respondendum has given way to personal service or summons or other form of notice, due process requires only that in order to subject the defendant to a judgment in personum, if he be not present within the territory of the forum, he has certain minimum contacts with its such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'

In the instant case, the minimum contacts with the State of Washington are inferred from the fact that Hamilton did knowingly place its product into the stream of interstate commerce with actual knowledge that it would go to all states.

In *Hanson v. Denckla*, 357 U.S. 235, 251 (1958) we may note this awareness of the situation:

> As technological progress has increased the flow of commerce between the states, the need for jurisdiction over non-residents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over non-residents have evolved from the rigid

> rule of *Pennoyer v. Neff*, 95 U.S. 714, 24 L. ed. 565, to the flexible standard of *International Shoe Co. v. Washington*. . . .

Mr. Justice Black's dissent in *Hanson* echoed this situation:

> That landmark case [*Pennoyer*] was decided in 1878, at a time when business affairs were predominantly local in nature and travel between states was difficult, costly and sometimes even dangerous. There the court laid down the broad principle that a state could not subject non-residents to the jurisdiction of its courts unless they were served with process within its boundaries or voluntarily appeared, except to the extent they had property in the state. But as the years have passed the constantly increasing ease and rapidity of communication and the tremendous growth of interstate business activity have led to a steady and inevitable relaxation of the strict limits on state jurisdiction announced in that case. In the course of this evolution the old jurisdictional landmarks have been left far behind so that in many instances states may now properly exercise jurisdiction over non-residents not amenable to service within their borders. Yet further relaxation seems certain.

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CONCLUSION

The days when a manufacturer could sit back in his home state and wait for injured parties to track him down are gone forever. When a manufacturer puts an item into the stream of interstate commerce he must be prepared to defend his product wherever it may cause injury.

Hamilton knowingly placed its product into the broad stream of interstate commerce and it ended up in Pierce County, Washington. Therein it did do substantial damage. Hamilton should and must be required to appear, defend and be subject to judgment in Pierce County, Washington.

For the reasons set forth here above the petition for writ of certiorari should be denied.

Respectfully submitted,

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